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In the Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,
Appellant

and

ROBERT ABRAMS, as Attorney General of the State of New York,
Intervenor-Appellant

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,
Appellees

On Appeal From the United States Court of Appeals for the Second Circuit

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT AND INTERVENOR-APPELLANT ON BEHALF OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, OREGON, SOUTH CAROLINA, UTAH, VERMONT, WASHINGTON, WYOMING AND AMERICAN SAMOA

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INTEREST OF AMICI CURIAE

The undersigned Commonwealths, States and Territory offer this brief as amici curiae in support of Appellant Schall and Intervenor-Appellant Abrams.

All amici have juvenile law provisions which are similar to New York's challenged provision. All allow brief preadjudication detention of alleged delinquents based on judges' evaluations of the likelihood of certain adverse behavior of the juveniles occurring between arrest and adjudication.[1] This type of detention is commonly referred to as preventive detention. This Court's determination in this case will, necessarily, have a profound effect on amici for if New York's system is unconstitutional, then a great many of the systems operated by amici may also be invalid.[2]

Amici urge this Court to reverse the Second Circuit and hold that New York's juvenile preventive detention statute is constitutional. We do so because, despite its shortcomings, the juvenile justice system is worth preserving. We echo the sentiments of this Court when it stated "[p]erhaps that ultimate disillusionment [with a separate juvenile system] will come one day, but for the moment we are disinclined to give impetus to it." *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (plurality opinion). That day has *not* come; but, the elimination of preventive detention would put the juvenile justice system in grave risk of extinction by seriously eroding public support for its separate existence.[3] Such a grave risk need not be taken.

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[1] The adverse behavior varies by state. See Appendix A for a summary of the provisions in the amici states.

[2] A case similar to this is currently pending in Pennsylvania, *Coleman et al. v. Stanziani et al.*, No. 81-2215 (E.D. Pa., filed May 29, 1981).

[3] *See* Argument III. C. *infra*.

SUMMARY OF ARGUMENT

Given the procedural protections of the New York Family Court Act[4] (hereinafter generally referred to as Juvenile law; specific sections are referred to as FCA §), due process is fully satisfied when, after arrest and before an adjudication of delinquency, an alleged delinquent is detained based on a finding that there is a serious risk the child may commit a crime before the determination of delinquency. This conclusion is mandated by application of a "fundamental fairness" analysis—the appropriate framework for evaluation of due process challenges to juvenile proceedings.

The first indicator that the challenged provision satisfies fundamental fairness is a comparison of the challenged provision and practices related to it with similar provisions and practices applied to adults. In New York, as in amici states, juveniles, like adults, are detained only if there is probable cause to believe they committed the crime charged. This, combined with a right to a speedy adjudication, is all that is required by the Constitution to justify detention between arrest and adjudication. Assuming, however, that New York's statute creates a statutory liberty interest requiring additional justification before a juvenile can be detained, the justification—serious risk that the child would commit a crime—and the procedures for determining whether it exists are similar to those found con-

[4] L. 1982, c. 920, §1 (1) McKinney's Session Law News of New York at 1982-148 (Jan. 1983), *as amended by*, L. 1982, c. 926 (*Id.* at 1982-255), and L. 1983, c. 398, §§1-50, adding Art. 3, *Juvenile Delinquency*, to the New York Family Court Act.

stitutional in other contexts and are constitutional themselves.

Even if the juvenile procedures did not fully meet the due process required of similar adult procedures, they would, nonetheless, still be valid under fundamental fairness because of the recognized differences between the adult criminal and juvenile systems. Preventive detention protects both the juvenile and the community; it serves these protective interests better than its alternative—bail—would. And, its elimination would seriously undermine public support for the juvenile system. Moreover, the use of preventive detention for juveniles has gained widespread acceptance in this country; it is favorably recommended in model juvenile statutes and in a variety of studies. In light of these considerations, fundamental fairness would not require abandonment of preventive detention.

ARGUMENT

I. The Applicable Standard for Evaluating This Due Process Challenge to Preadjudication Detention of Juveniles Is Fundamental Fairness

This Court does not "automatically and peremptorily" apply constitutional rights given adults accused of crimes to juveniles accused of delinquency. *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (hereinafter *McKeiver*).[5] Instead, the Court uses a "fundamental fairness" standard for evaluating due process challenges to juvenile court proceedings, *id.* at 543; that is, whether a particular procedure, standard, or right "is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." *In re Winship*, 397 U.S. 358, 359 (1970) (footnote omitted).

Certainly no more stringent standard would be applied to *preadjudicatory* proceedings.[6] Thus, the question raised in this case is simply whether the fundamental fair-

[5] Four justices joined the plurality opinion. Justice Brennan, concurring in part and dissenting in part, did agree with the plurality that the same procedural rights given adults need not be applied to juveniles.

[6] This Court has not yet had occasion to articulate the standard by which preadjudicatory challenges must be evaluated. But, it has recognized that the preadjudicatory stages are "distinctive" to the juvenile system, *In re Winship*, 397 U.S. 358, 366-367 (1970), and it has been careful to limit application of the fundamental fairness analysis to the delinquency adjudicatory pro-

ness standard forbids preadjudication detention of juveniles when there is probable cause to believe that they have committed a crime and that there is a serious risk they will commit another crime if released prior to their adjudicatory hearing. There is no easily applied method of evaluating whether that standard is met. *McKeiver* does, however, give considerable guidance.

There, in evaluating whether fundamental fairness required that juveniles be given jury trials, the Court first examined that right as applied to adults. *Id.* at 540-41. A finding that an adult's right to a jury trial was "fundamental to the American scheme of justice" did not, however, answer the question of whether it was required for juvenile delinquency adjudications. *Id.* Rather, the Court went on to consider a number of other factors before concluding, based on those factors, that fundamental fairness did not require that juveniles be given jury trials. Most of these other factors can be grouped in two categories: (1) whether imposition of the asserted due process right would adversely affect the unique and beneficial aspects of the juvenile system, *id.* at 545, 547, 550; and, (2) whether current thinking reflected in model acts, standards, statutes, case law and studies demonstrates a widely held belief that the challenged practice is fundamentally unfair. *Id.* at 545-46, 548-50. Under the *McKeiver* analysis, the procedures New York provides for determining whether a juvenile should be detained prior to adjudication are constitutionally adequate.

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cess itself—expressly excluding "pre-judicial stages." *In re Gault*, 387 U.S. 1, 13 (1966); *In Re Winship*, 397 U.S. at 358, 359 n. 1. Although this suggests that a lesser standard might be applicable in evaluating preadjudicatory proceedings, we apply the fundamental fairness standard here.

II. A Comparison of Due Process Given Adults in Analogous Situations Demonstrates That the Challenged Procedures Satisfy Fundamental Fairness

A. Because adults' constitutionally guaranteed liberty interests are not abridged by pretrial detention if there is probable cause to believe they committed the crime charged, a fortiori juveniles' constitutional liberty interests are not abridged by preadjudication detention that is similarly based.

The starting point, as *McKeiver* teaches, is an analysis of whether and to what extent adults are entitled to the constitutional protection being asserted by the juvenile. This Court has determined that adults may be subjected to pretrial detention if sufficient due process is given. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (hereinafter *Gerstein*).

The essential due process requirement for a pretrial "extended restraint of liberty" of an adult accused of a crime is an adequate determination that there is probable cause to believe the individual committed the crime. *Id.* at 114. That determination combined with the Sixth Amendment right to a speedy trial, as an outside limit to the length of detention, adequately protects an adult from an improper pretrial deprivation of liberty.[7] *Baker v. McCollan*,

[7] By constitution or statute most jurisdictions have established a right to bail during this pretrial period for adults charged with noncapital offenses. *See e.g.*, 18 U.S.C.A. §3146; Alaska Const., art. I, §11; Fla. Const., art. I, §14; Pa. Const., art. I, §14; Wash. Const., art. I, §20. This Court has not definitively ruled on whether there is a federal constitutional right to bail. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). The Court has, however, strongly suggested that there is none. *Carlson v. Landon*, 342 U.S. 524, 545-46 (1952) (none exists in deportation cases).

443 U.S. 137, 144, 145 (1979). Certainly, juveniles are entitled to no greater protection than adults and even assuming, *arguendo*, that their rights are identical, New York's juvenile system satisfies constitutional requirements.

An alleged delinquent may be arrested, before the filing of a petition, on probable cause or may be taken into custody after the filing of a petition.[8] A child may be arrested on the same probable cause determination as an adult. Thereafter, the juvenile must be released to parents or taken either to juvenile court or to a juvenile detention facility. FCA §305.2. If the child is taken to a detention facility, the facility authorities must, pursuant to court rules, initially decide whether the allegations against the child appear to show he or she committed a delinquent act. If they do not, this initial, informal probable cause determination results in the child's release. FCA §307.3. If the child is not released by the facility, he or she must be taken to juvenile court within the next court session day or 72 hours whichever is sooner. *Id.* Once taken to court (either

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See Sistrunk v. Lyons, 646 F.2d 64, 70 (3d Cir. 1981) (holding that there is none in criminal cases). This difficult question need not be addressed by the Court in this case. Even if a federal constitutional right to bail exists for adults, it would not necessarily exist for juveniles. *See McKeiver*. Virtually all courts that have addressed the question of whether juveniles have the same rights to bail as have been enacted for adults have concluded that the pre-adjudication release provisions of juvenile acts are adequate substitutes for bail. *See* note 40 *infra*.

[8] The juvenile delinquency petition is the instrument through which a delinquency proceeding is initiated. FCA §310.1. It is served on the juvenile along with a summons, FCA §312.1, or warrant, FCA §312.2. It must contain allegations sufficient to "provide reasonable cause to believe that the [juvenile] committed the crime or crimes charged." FCA §311.2.

by the arresting officer or by facility personnel), there is a "preliminary determination hearing" to decide, *inter alia*, whether the juvenile court has jurisdiction. FCA §307.4. This implicitly requires a preliminary probable cause finding because the juvenile court would only have jurisdiction over an alleged delinquent if, in fact, there were some reason to believe the child committed a crime. Within four days of this determination, the child is given another opportunity for a more formal probable cause hearing which is adversarial. *Id.*; FCA §§325.1-325.3. These procedures are very similar to those utilized for adult arrests without warrants which were cited by this Court with apparent approval in *Gerstein*, 420 U.S. at 124 n.25.

If a child is taken into custody after the filing of a petition, he or she is also entitled to several probable cause determinations. First, the petition itself must contain information sufficient to establish probable cause. FCA §311.2. After the petition is filed, an "initial appearance" before the court must be held within the sooner of the next court session day or 72 hours. FCA §320.2. There the court must determine, *inter alia*, whether detention is necessary. FCA §320.4. Implicit in this is an assessment of probable cause; if probable cause to believe the juvenile committed the crime were lacking there would be no need for detention. The juvenile is then entitled to the same formal probable cause hearing provided to a child arrested prior to the filing of a petition, FCA §§325.1-325.3, which must be held within three days of the initial appearance or four days of the petition's being filed, whichever is sooner. Again, under *Gerstein*, these procedures would be sufficient for adults accused of crimes. *Gerstein*, 420 U.S. at 124 n.25. *A fortiori*, they are more than sufficient when applied to juveniles.

While the due process afforded juveniles through the probable cause determinations is similar to that given adults, the protection given detained juveniles under the statutory speedy trial requirement is much greater than that given adults. In New York an adult's trial on a felony must commence in six months, N.Y. Crim. Proc. Law (Consol.) §30.30.1(a); a detained juvenile's fact-finding hearing on a felony, however, must commence in 17 days.[9] FCA §§307.4, 320.2, 340.1.

As is noted above. the Constitution does not afford any greater rights to juveniles than to adults. Thus under *Gerstein* and *McCollan*, juveniles, as well as adults, constitutionally may be deprived of their liberty based on a finding of probable cause to believe that they have committed the crime charged. New York requires such a finding before or promptly after a juvenile's preadjudication detention commences. No further justification is constitutionally required in the absence of a separate, state-created liberty interest. *See Hewitt v. Helms*, 103 S.Ct. 864 (1983).

In this regard, New York's statute does not require preadjudication release unless, *inter alia*, there is a serious risk that the juvenile would commit a crime if released. FCA §§307.4.4(c), 320.5.3. Even assuming that this creates a statutory liberty interest and requires justification in addition to probable cause for preadjudicatory detention,

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[9] Compare, *e. g.*, Alaska—120 days for adults, Alaska R. Crim. Pro. 45, 30 days for juveniles, Alaska R. Children's Pro. 7; Kansas—90 days for adults in custody, Kan. Stat. §22-3402, 30 days for juveniles, Kan. Stat. §38-1625(a); Pa.—180 days for adults, Pa. R. Crim. Pro. 1100(a)(2), 13 days for juveniles, 42 Pa. Cons. S. Ann. §6335.

New York's statute is valid because the determination of this additional consideration is made with sufficient due process.[10]

B. Because in various analogous contexts adults may be deprived of liberty if there is a finding that they are likely to behave in a prohibited manner, a fortiori juveniles may be deprived of liberty on the same basis.

In New York, the preadjudication detention determination requires the decisionmaker to evaluate the likelihood of certain future behavior of the juvenile—conduct which would constitute a crime if committed by an adult. This is a constitutionally permissible standard on which to base the detention decision.

This Court has specifically rejected the contentions "that it is impossible to predict future behavior and that the question [of whether it is probable that a defendant would commit a crime of violence and be a threat to society] is so vague as to be meaningless." *Jurek v. Texas*, 428 U.S. 262, 274-75 (1976) (hereinafter *Jurek*). Moreover, it has done so in the context of the ultimate loss of liberty—

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[10] The Second Circuit's holding that New York's preventive detention provision violated due process because its "substantively and procedurally unlimited" terms resulted in detention of many alleged delinquents who either would not be adjudicated guilty or would not be sentenced to confinement if found guilty, *Martin v. Strasburg*, 689 F.2d 365, 374 (2d Cir. 1982), is in error for several reasons. First, even in the adult criminal justice system, the final disposition of a case is irrelevant to the legality of pretrial detention, *Baker v. McCollan*, 443 U.S. 137, 145 (1979); and, second, as will be shown herein, the procedures are not so unlimited as to violate due process.

imposition of the death penalty.[11] In so doing, the Court recognized that although it is not easy to predict future behavior, "[t]he fact that such a determination is difficult . . . does not mean that it cannot be made." *Id. See also Barefoot v. Estelle,* 51 U.S.L.W. 5189 (U.S. July 6, 1983) (reaffirming the holding in *Jurek*).

Indeed, this type of judgment invariably is an important element in many decisions affecting liberty and property interests. *See Jurek,* 428 U.S. at 275. In addition to death penalty decisions it is used in: initial sentencing decisions,[12] including whether to sentence as a "special dangerous offender";[13] modification of sentencing, such as commutation[14] or granting of parole;[15] internal administrative prison decisions, such as whether to impose administrative segregation;[16] parole revocation;[17] bail decisions pending sentencing or appeal;[18] pretrial detention deci-

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[11] This Court has not yet had occasion to rule on the validity of adult preventive detention. *See Bell v. Wolfish,* 441 U.S. 520, 534 n.15 (1979). See further discussion of adult preventive detention at note 20 *infra.*

[12] *Jurek,* 428 U.S. at 275, 275 n.10, (dicta); *United States v. Neary,* 552 F.2d 1184, 1194 (7th Cir.), *cert. denied,* 434 U.S. 864 (1977).

[13] 18 U.S.C.A. §3575 (Supp. 1983); *United States v. Davis,* No. 82-1442 (3d Cir., June 21, 1983) (Slip Op. attached as Appendix C.)

[14] *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 464 (1981).

[15] *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1, 9-10, 13 (1979); *Jurek,* 428 U.S. at 275, 275 n.11 (dicta).

[16] *Hewitt v. Helms,* 103 S.Ct. 864, 873 (1983).

[17] *Morrissey v. Brewer,* 408 U.S. 471, 480 (1972).

[18] *See, e.g.,* 18 U.S.C.A. §3148 (Supp. 1983); *Jurek,* 428 U.S. at 275 (dicta); *Rehman v. California,* 85 S.Ct. 8 (1964) (Douglass as Cir. J.); *Carbo v. United States,* 82 S.Ct. 662 (1962) (Douglass

sions, including bail pending trial (determination of the likelihood defendant will flee and the conditions which would prevent flight),[19] and adult preventive detention;[20]

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as Cir. J.); *United States v. Baca*, 444 F.2d 1292 (10th Cir.), *cert. denied* 404 U.S. 979 (1971); *State v. Dodson*, Mo. App. , 556 S.W.2d 938 (1977).

[19] *See, e.g.*, 18 U.S.C.A. §3146 (Supp. 1983); *Jurek*, 428 U.S. at 275 (dicta); *see also Fernandez v. United States*, 81 S.Ct. 642, 644 (1961) (Harlan as Cir. J.).

[20] The federal bail statute does not expressly allow consideration of the likelihood that a defendant will be a danger to the community if released. *Compare* 18 U.S.C.A. §3146 *with* §3148. *But see* H.R. 3005, 98th Cong., 1st Session (May 12, 1983) and U.S. Dept. of Justice, *Attorney General's Task Force on Violent Crime, Final Report* (U.S. Gov't Printing Office, 1981) at 50-51 (both proposing reform of adult bail to allow consideration of future dangerousness).

Some courts have held that *state* court judges have inherent power in the exercise of their discretion to deny bail if relase would endanger the community. *See, e.g., Nail v. Slayton*, 353 F. Supp. 1013 (W.D. Va. 1972); *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S.D.N.Y. 1969); *Wansley v. Wilkerson*, 263 F. Supp. 54 (W.D. Va. 1967); *People v. Melville*, 62 Misc. 2d 366, 308 N.Y.S.2d 671 (1970); *cf. Fernandez v. United States*, 81 S.Ct. 642 (1961) (Harlan as Cir. J.) (bail revoked during trial based on threats to witnesses); *Carlson v. Landon*, 342 U.S. 524 (1952) (bail prior to deportation hearing denied on grounds of dangerousness in the discretion of the Attorney General).

Adult preventive detention is now authorized by statute or rule in several jurisdictions. The first preventive detention statute for adults was that passed by Congress for the District of Columbia, D.C. Code §23-1322; (constitutionality upheld in *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) *cert. denied*, 455 U.S. 1022 (1982)). Subsequently several other jurisdictions have adopted provisions which permit pretrial detention of an accused for the protection of others or the community. *See, e.g.* Cal. Const. art. I, §12 (*as amended* June 8, 1982); Fla. Const. art. I, §14 (*as amended* Nov. 2, 1982); Mich. Const. art. I, §15(c).

mental health commitments;[21] and, various other civil law contexts, such as those requiring an assessment of the "best interests" of a child[22] and whether there is standing to seek an injunction.[23]

C. Procedures for determining the likelihood of future conduct have been found to be adequate in analogous situations; thus, New York's juvenile procedures are, likewise, adequate.

The specific procedural protections required in establishing the likelihood of future behavior in the different

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It has been recognized that, through imposition of high money bail requirements, judges detain defendants they believe to be dangerous. *See* National District Attorneys Assoc. (NDAA), *National Prosecution Standards* (1979) at 141, 146; National Assoc. of Pretrial Service Agencies (NAPSA), *Performance Standards and Goals for Pretrial Release and Division—Pretrial Release* (1978) at 38. As reform of the adult money bail system eliminates this *de facto* preventive detention, the need for express authority to detain for protective purposes is being recognized. *See e.g.*, NDAA Standards, Standard 10.8 A. 6 and 7, at 139 and 146; NAPSA Standards, Standard VII at 35-44; American Bar Association, *Standards for Criminal Justice*, Standard 10-5.9(b)(i) and (ii), at 10.95 (allowing pretrial protective detention in limited circumstances). The reform, in fact, is bringing the adult detention law closer towards the juvenile law; that is, a presumption of release without the need for posting of security unless certain circumstances are present.

[21] *Addington v. Texas*, 441 U.S. 418, 425-26 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975)

[22] *See, e.g., Planned Parenthood Assoc. v. Ashcroft*, 51 U.S.L.W. 4783, 4787 (U.S. June 15, 1983) (upholding constitutionality of allowing judge to determine whether an immature minor should have an abortion); *Santosky v. Kramer*, 455 U.S. 745 (1982) (involuntary termination of parental rights).

[23] *See, e.g., Los Angeles v. Lyons*, 103 S.Ct. 1660 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

situations mentioned above varies. *Compare* cases and statutes cited in notes 13-23 *supra*. This variation exists because due process "is flexible and calls for such protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See also, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979). Despite the variations, some generalizations can be garnered from the cases. Application of these general principles to New York's statute demonstrates that it satisfies due process.

The specific process due in any particular case depends on "a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See also Addington v. Texas*, 441 U.S. 418 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The government functions involved here are important: protecting the child[24] and protecting the public by controlling crime.[25] Preventive detention is an essential part of the overall pretrial stage where the goals of protecting and informally dealing with the child are strongest and the due process concerns more limited. The child's interest is, of course, a liberty interest.[26] But the maximum "deprivation" which can occur is 17 days.

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[24] See Argument III. A. *infra* for discussion of how preventive detention protects the child.

[25] *Cf. Gerstein*, 420 U.S. at 112 (purpose of adult pretrial detention in controlling crime).

[26] It has been suggested, however, that a child's liberty interest is not coextensive with an adult's because he or she is subject to parental control. *Morris v. D'Amario*, R.I. , 416 A.2d 137, 140 (1980).

1. *Nature of the proceeding*—In New York, a juvenile has at least three opportunities for release if the likelihood he or she will commit a crime is not established. At each proceeding to determine probable cause (see *supra* at 7-8) a determination of this likelihood is also made. This includes the "preliminary determination" hearing, FCA §307.4; the "initial appearance," FCA §§320.2-320.5; and the formal probable cause hearing, FCA §325.3.3. At each stage the juvenile is represented by counsel and, presumably, is entitled to be heard.[27] Moreover, while these hearings need not be adversarial, *see Gerstein*, 420 U.S. at 120, New York's formal probable cause hearing is. In addition, a statement of the facts and reasons supporting the finding must be given. FCA §§307.4.4(c), 320.5.3.

2. *Information to be considered* — The decision-maker should consider all available information relevant to

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A child released pending adjudication would not, like an adult, "gain individual freedom from custody, but would simply be restored to parental custody." *Baker v. Smith*, Ky. , 477 S.W. 2d 149, 151 (1971). *See also, Pauley v. Gross*, 1 Kan. App. 2d 736, , 574 P.2d 234, 240 (1977). *Cf. Parham v. J.R.*, 442 U.S. 584 (1979) (due process requirements for a child's commitment to mental institution with parental consent not as rigorous as involuntary commitment of an adult); *Planned Parenthood v. Ashcroft*, 51 U.S.L.W. 4783, 4787 (U.S. June 15, 1983) (immature minor female's right to an abortion may be subject to conditions (judicial judgment of best interests) that adult's right may not be).

[27] The statutory provisions governing the first two of these stages do not explictly state that the juvenile has a right to be heard. But the provisions for counsel clearly contemplate a right to be heard. Moreover, when the statute is read in the context of constitutional principles, as it must be, the right to be heard is implicit. *See Kent v. United States*, 383 U.S. 541, 553 (1966). Certainly, a judge could not make the required "determination" without hearing the facts and views presented by the juvenile.

the assessment of likelihood that the juvenile would commit a crime if released, allowing a decision that is particularized to the individual. *See Fernandez v. United States*, 81 S.Ct. 642, 644 (1961) (Harlan as Cir. J.); *see also Hewitt v. Helms*, 103 S.Ct. 864, 874, 874 n.9 (1983); *United States v. Edwards*, 430 A.2d 1321, 1337 (D.C. (1981), *cert. denied*, 455 U.S. 1022 (1982). Specific factors need not be specified in the statute if, as here, there is a right to a hearing, counsel, and a statement of reasons. *See Kent v. United States*, 383 U.S. 541 (1966); *see also, Jurek*. These rights and the absence of rigid criteria properly allow the decisionmaker to consider "all possible relevant information about the individual defendant whose fate it must determine." *Jurek*, 428 U.S. at 276; *see also, id.* at 271; *Planned Parenthood Assoc. v. Ashcroft*, 51 U.S.L.W. 4783, 4787 (U.S. June 15, 1983) ("best interest" sufficient criteria for judges to determine if immature pregnant minor should have an abortion); *United States v. Davis*, No. 82-1442 (3d Cir., June 21, 1983) (18 U.S.C.A. §3575 is not unconstitutional although it contains no factors for determining whether offender is dangerous).

New York's statute follows this trend in not specifying a catalogue of factors to be considered. It does, however, require that all decisions consider the "needs and best interests" of the juvenile and the community's need for protection.[28] FCA §301.1.

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[28] *Compare*, D.C. Code, §23-1322(b)(2)(B)(ii), referencing §23-1321(b) which lists factors to be considered in adult preventive detention. This listing—which by its term is not exhaustive—is so broad and general that it amounts to little more than a direction to consider all factors indicative of the individual's particular circumstances.

The determination of whether the juvenile would commit a crime is a practical, non-technical determination. *See Barefoot v. Estelle*, 51 U.S.L.W. 5189, 5194 (1983); *Jurek*, 428 U.S. at 275-76 (decision made by jury); *see also Estelle v. Smith*, 451 U.S. 454, 472-73 (1981); *cf., Gerstein*, 420 U.S. at 112, 121. Making the determination calls for an "experienced prediction based on a host of variables," *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 16 (1979) (analogous determination in parole revocation), for which the experiences of the juvenile court judge amply qualifies him or her.

The information on which the decision is based cannot be as complete as that required in the assessment of likelihood in the death penalty determination. *See Jurek*, 428 U.S. at 276. But, it is as complete as possible given the time constraints in which the decision must be made. *See United States v. Edward*, 430 A.2d 1321, 1337 (D.C. 1981); *see also Hewitt v. Helms*, 103 S.Ct. 864, 874 (1983). And, again, the consequences in the preventive detention determination are not as dire as those in the death penalty determination. There simply can be more tolerance for error.

3. *The burden of proof*—The burden by which the likelihood of future conduct must be proven varies. The greater the liberty or property interest at jeopardy, the higher is the required degree of proof. *See Gerstein*, 420 U.S. at 121; *compare, Jurek* (statutory standard of beyond a reasonable doubt burden for death penalty) *with Santosky v. Kramer*, 455 U.S. 745 (1982), *and Addington v. Texas*, 441 U.S. 418 (1979) (clear and convincing burden for involuntary termination of parental rights and for lengthy mental illness commitment), *with Williams v. Illinois*, 399 U.S. 235, 243 (1970), *and* 18 U.S.C. §§3146, 3148 (judicial discretion for sentencing and for setting bail).

It is unclear whether New York's statute specifies the degree of proof necessary to establish the likelihood the juvenile would commit a crime. The standard of proof is either "serious risk," *see* FCA §320.5.3(b), or it is not specified. If the standard is "serious risk" it exceeds constitutional requirements, as will be shown below. If none is specified, the statute must be read in the context of relevant constitutional principles, *see Kent*, 383 U.S. at 553, and, therefore, the minimum standard of proof required by due process is implicitly contained in the statute.[29] In either case, the statute is constitutional.[30]

Of the examples given above of decisions requiring a determination of the likelihood of future behavior, the juvenile preventive detention decision is most similar to the adult pretrial bail and preventive detention decisions. In making the determination of the likelihood an adult would flee and what conditions, if any, would guarantee the accused's presence, the standard of proof required is "judicial discretion." *See* note 19 *supra*. The pretrial deprivation of an adult's liberty which may result from this decision is vastly longer than the allowable detention of a juvenile. There is nothing inherently more difficult or un-

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[29] The task of determining the applicable constitutionally minimum degree of proof has, in fact, "traditionally been left to the judiciary to resolve." *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 284 (1966); *accord, Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982). States may, of course, statutorily impose a higher degree of proof than that imposed by the Constitution. *Santosky*, 455 U.S. at 769-70; *Addington v. Texas*, 441 U.S. 418, 431 (1979).

[30] This is *not* a case like *Santosky v. Kramer*, 455 U.S. 745 (1982), in which the statute expressly specified a burden of proof less stringent than that required by due process and, therefore, had to be found unconstitutional.

reliable in predicting the future commission of a crime than in predicting flight from the court's jurisdiction or the conditions that will prevent flight.[31] *United States v. Edwards*, 430 A.2d 1321, 1342 (D.C. 1981).[32] Thus, if judicial discretion is adequate in the adult bail context, it is adequate in the juvenile preventive detention decision.[33]

Judicial discretion requires that there be reasonable grounds for the decision. *Burns v. United States*, 287 U.S. 216, 222-23 (1932); see also, *Leis v. Flynt*, 439 U.S. 438, 455 n.26 (1979) (Stevens, J., dissenting on other grounds). Because a reasonable ground is also required for a probable cause determination (*see Gerstein*, 420 U.S. at 111), the three standards—judicial discretion, reasonable grounds, and probable cause—are extremely similar.[34] Therefore, by analogy to *Gerstein*, just as the decision to detain an accused adult pretrial requires no more than a finding of probable cause to believe the accused committed

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[31] In fact, in some jurisdictions an assessment of whether the accused adult presents a danger to the public is a factor considered in deciding whether to release the defendant on his or her own recognizance, or nominal bail, or on full bail. *See e.g.*, Alaska Stat. §12.30.020; Or. Rev. Stat. §135.230(6)(g); Pa. R. Crim. Proc. 4003(a)(3).

[32] The adult preventive detention statute upheld in *Edwards* now authorizes detention for up to 90 days. D.C. Code §23-1322(d)(4) (Supp. 1983). While one of the requisite findings requires proof by clear and convincing evidence, §23-1322(b)(2)(A), and another requires substantial probability, §23-1322(b)(2)(C), no specific burden is specified for the finding of likelihood that the safety of the community would be endangered, §23-1322(b)(2)(B).

[33] The judicial discretion standard is also consistent with the "best interest" standard employed in many decisions involving children. *See* cases cited note 22 *supra*.

[34] *See Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (appearing to equate probable cause and reasonable grounds).

the offense, so too in order to detain preventively an alleged delinquent there need only be probable cause to believe he or she would commit a crime. *See L.O.W. v. District Court of Arapahoe,* Colo. , 623 P.2d 1253, 1254 (1981).

As the foregoing discussion demonstrates, assessments of the likelihood of future prohibited conduct form the basis for decisions in many and varied circumstances. Although the assessment cannot be made with absolute certainty, it is an accepted basis for many decisions affecting individuals' liberty. Its efficacy as a basis for determining the preadjudicatory detention of children is at least equal to, if not greater than, its efficacy as a basis for rendering the many other kinds of decisions affecting liberty for which it is routinely used. The procedures and standards contained in New York's juvenile act provide sufficient safeguards to ensure that the detention decision is not violative of due process.

III. Elimination of Preventive Detention Would Adversely Affect the Juvenile Justice System and Is, Therefore, Not Required by Fundamental Fairness

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When determining whether fundamental fairness requires that juveniles be accorded the same contours of constitutional protection accorded to adults, the Court has been careful not to require substantial alterations in the juvenile system if such changes would "compel states to abandon or displace any of the substantive benefits of the juvenile process." *In Re Gault,* 387 U.S. 1, 21 (1967); *see also McKeiver.* Elimination of preventive detention would have this result in at least the three ways discussed below.

A. Elimination of preventive detention would hinder the state's ability to protect the juvenile from the consequences of the crime which there is reason to believe he or she would commit.

The state has "a *parens patriae* interest in preserving and promoting the welfare of [a] child." *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). Preventive detention furthers this goal by protecting the juvenile from the adverse consequences that would result if the juvenile had been released and committed a crime. These consequences include the obvious further subjection of the juvenile to the authority of the juvenile court or to the criminal justice system.

Committing successive delinquent acts sets the child on a downward spiraling pattern that may require more drastic rehabilitation in the juvenile system, or even punishment in the adult system, and consequent hindrance to the child's moral development. By use of preventive detention in cases in which it is likely that the child will soon commit another crime, the juvenile system seeks to break the pattern, spare the child additional rehabilitation or punishment, and aid the child in maturing into a law-abiding citizen. *Morris v. D'Amario,* R.I. , 416 A.2d 137, 140 (1980).

One of the premises for juvenile statutes is that, because of his or her immaturity, a child may not always exercise good judgment. The restraints that keep an adult released on bail from committing crimes may not operate similarly to restrain a child. *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, , 385 N.Y.S.2d 518, 520-21, 350 N.E.2d 906, 909 (1976). A child is particularly susceptible to peer pressure and bad influences. *Id.* The child may not appreciate the nature of his or her acts and may view them as a "lark," a "dare," or a "prank." *Id.*

He or she may not be properly supervised and may be in an atmosphere which would foster delinquent behavior. *Id. See also Baker v. Smith,* Ky. , 477 S.W.2d 149, 151 (1971). In short, "in situations where [society] requires protection, the minor may be detained because the same acts that threaten society also threaten the minor. . . ." *Aubry v. Gadbois,* 50 Cal. App. 3d 470, 475, 123 Cal. Rptr. 365, 368 (1975).

B. Elimination of preventive detention would necessitate adoption of an alternative; the likely alternative—bail—would not serve juveniles' or the public's interests.

If preventive detention was unavailable, the state would have little choice but to use a bail system for children.[35] Bail would not only fail to satisfy the governmental interests presently served by preventive detention, but would, in addition, create new, and more troublesome, problems.

For example, the use of bail would "not necessarily result in a juvenile's release from detention." *L.O.W. v. District Court of Arapahoe,* Colo. , 623 P.2d 1253, 1258 (1981). Thus, bail would not correct the problem

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[35] Certainly, a delinquent child who has been taken into custody upon probable cause and who, it is reasonably believed, will commit a crime, need not simply be released into the community with no effective protection for the child or society. It is unrealistic to believe that society would tolerate such a system. Unquestionably, it can be presumed that if juvenile court judges could not order detention in the limited circumstances now allowed under state law, they would be forced to use a bail system despite its ineffectiveness as is described in this section of amici's brief. States that do not use preventive detention do use a bail system. *See* President's Commission on Law Enforcement and Administration of Justice, Task Force Report; *Juvenile Delinquency and Youth Crime* (U.S. Gov't Printing Office 1967) at 5.

of over-utilization of detention which the Second Circuit apparently perceived in holding New York's statute unconstitutional (*Martin v. Strasburg*, 689 F.2d 365, 374 (2d Cir. 1982).

> If children are detained too frequently, a right to bail will not remedy the practice. Hill, The Constitutional Controversy of a Juvenile's Right to Bail, [1 Hastings Const. Law Q. 215 (1974)]; 18 Vanderbilt L. Rev. 2096, 2107 n.51. It is more likely that were it recognized, a right to bail would become a substitute for other, more appropriate forms of release. Commentary to American Bar Association's Juvenile Justice Standards Relating to Interim Status (1980) at 66.

L.O.W., 623 P.2d at 1258. *See also Doe v. State*, Alaska , 487 P.2d 47, 52 (1971). In fact, a child may be less likely to be released on bail than through the current juvenile procedure. *See Fulwood v. Stone*, 394 F.2d 939 (D.C. Cir. 1967) (vacating district court's setting of bail (which juvenile could not meet) on grounds that release may be appropriate under the substitute for bail provided in the juvenile system).

Moreover, bail will not work for children because most will not have sufficient financial resources of their own to restrain their behavior—they simply have too little to lose. In practice, a child's right to pretrial release would "depend on the economic position of his parents rather than considerations relevant to the goals of the Juvenile Court Act." *Id.* at 943 n.13; *accord, Kinney v. Lenon*, 447 F.2d 596, 599 n.5 (9th Cir. 1971); *see also Doe v. State*, Alaska , 487 P.2d 47, 52 (1971). The parents may feel obliged to obtain bail for their child even if they do not feel able to control him or her. The

child's behavior will not necessarily be restrained and the child will not learn that he or she must be responsible for his or her own actions. On the other hand, the parents may be unable or unwilling to post bail. *L.O.W. v. District Court of Arapahoe,* Colo. , 623 P.2d 1253, 1258 (1981). This could create animosity between the child and parents which necessarily would have an adverse effect on the child's proper development and future behavior.

Bail "is one of those attributes of the criminal process that it is wise for the juvenile court system to be free of." *Kinney v. Lenon,* 447 F.2d 596, 599 n.5 (9th Cir. 1971). It would "cause unexplored difficulties for most juveniles." *L.O.W.,* 623 P.2d at 1257. Preventive detention under limited circumstances is

> more in keeping with the purposes of the family court than bail, will more adequately protect juveniles against unwarranted restraints on their liberty, and will not be subject to the abuses and injustices that have occurred in the adult criminal justice system as a result of reliance on bail and other financial conditions for release.

United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice,* Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention (U.S. Government Printing Office, July 1980) at 295-96.

C. Elimination of preventive detention may threaten the continued existence of the juvenile system.

Elimination of preventive detention and the inevitable substitution of bail would result in the juvenile sys-

tem becoming more like the adult system. But, if the juvenile system is made to parallel the adult "there is little need for its separate existence." *McKeiver*, 403 U.S. at 551. Not only would the need for a separate system be reduced but so too would the public's support for a separate system.

Juvenile law represents a delicate balancing among competing interests: providing adequate procedural safeguards for juveniles; preserving a system through which guidance and rehabilitation—not criminal responsibility, guilt and punishment—can be given; and, protecting society.[36] *See Kent v. United States*, 383 U.S. 541, 554 (1966). It is unlikely that society will continue to support the juvenile system's preferential treatment of children if it feels this balance is upset in a manner which leaves the public inadequately protected.

The public believes that there has been a substantial increase in juvenile crime. *See* Christian Science Monitor, Dec. 8, 1982 (Mid-Western Ed.) at 6 (reporting results of national survey by the Opinion Research Corp. showing 87% believe juvenile crime has been rising sharply; *see also New York Times*, July 24, 1981, Sect. A, at 1, Col. 5. Public Opinion Polls from Hutzler. In response to this perception there has developed a discernible trend to reduce the juvenile court's jurisdiction and increase that of the adult criminal court. *Id.*; Hutzler, *Canon to the Left, Canon to the Right: Can the Juvenile Court Survive?*, 1 Today's Delinquent 25 (National Center for Juvenile Justice) (1982). States' juvenile laws have been amended in recent years: to exclude from juvenile court jurisdiction children accused of committing certain enumerated of-

[36] *See e.g.*, FCA §301.1; 42 Pa. Cons. Stat. Ann. §6301.

fenses, to require waiver of a case from juvenile to adult court, to increase substantially the types of cases that may be waived, to make it procedurally easier to waive a case, and to provide for concurrent jurisdiction of juvenile and adult court—thereby giving the district attorney authority to choose the forum.[37] A few states even have altered the stated purposes of their juvenile acts to incorporate such principles as punishment, deterrence, and accountability—principles traditionally associated with the adult system,[38] but foreign to the juvenile system. *Id.* at 33.

The result of the public's "alarm" and "outrage" over perceived increases in juvenile crime, *id.* at 30, has been a "clear trend . . . away from the discretion of juvenile court intake officers and judges to consider the social factors of a child and his family [and] toward criminal justice policies of prosecutorial discretion and decision-making based on present offense and prior record." *Id.* at 35. Elimination of preventive detention will fuel the public's alarm and outrage and will accelerate this trend. If this trend continues, the distinctions between the adult and juvenile systems will be obliterated and, indeed, as *McKeiver* recognized, "there [will be] little need for [the juvenile court's] separate existence." 403 U.S. at 551. The *amici* states urge this Court to act as it did in *McKeiver* by upholding the challenged statute and, thereby, refusing to give impetus to the ultimate disillusionment with the juvenile system. *Id.*

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[37] See compilation of statutes in Appendix B.

[38] See compilation of statutes in Appendix B.

IV. Current Thinking Reflected in Studies, Standards, State Court Decisions and Model Acts Is That Juvenile Preventive Detention Satisfies Concepts of Fundamental Fairness

In determining that denial of jury trials did not violate fundamental fairness, the Court in *McKeiver* considered various indicators of current thinking on the issue: the recommendation of a presidential task force on juvenile delinquency, 403 U.S. at 545-46; how widespread the practice of non-jury trials was in the states, *id.* at 548-49; the decisions of state courts on the issue, *id.* at 549; and, the provisions of model acts, *id.* at 549-50. Here, as in *McKeiver*, consideration of these sources reflects broad approval of preventive detention of juveniles.

First, in developing standards for the juvenile court system various groups of experts have recommended the use of preventive detention and rejected the use of bail. See United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice*, Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention (U.S. Government Printing Office, July 1980), at 294-96 and similar standards and recommendations of other organizations cited therein, including the same presidential task force relied on in *McKeiver*.

Second, in *McKeiver* the Court looked at how widespread the practice was to determine "whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 403 U.S. at 548 (citations omitted). There, at least 28 states denied juveniles a jury trial by

statute and others did so by judicial decisions. *Cf. Santosky v. Kramer*, 455 U.S. 745, 749, 767 (1982) (35 states had higher burdens of proof than that declared invalid). Most, if not all, jurisdictions permit preventive detention.[39] The practice of preventive detention is as widespread as was the practice of denying jury trials upheld in *McKeiver*.

Similarly, in *McKeiver* the "great majority" of state courts that had faced the issue concluded that denying juveniles a jury trial was constitutional. 403 U.S. at 549. Virtually every court that has considered whether juveniles have a right to bail[40] or whether they may be preventively detained pending adjudication[41] has held that there is no right to bail and that the child may be detained. Those few courts holding that juveniles have been improperly detained preadjudication have done so on the ground that no due process probable cause hearing was held to justify the detention.[42] These cases do not hold that *preventive detention* is invalid *per se* but only that *any detention without probable cause* is invalid.

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[39] *See* President's Commission on Law Enforcement and Administration of Justice, Task Force Report; *Juvenile Delinquency and Youth Crime* (U.S. Gov't Printing Office 1967) at 5.

[40] *See L.O.W. v. District Court of Arapahoe*, Colo. , 623 P.2d 1253, 1258 (1981) (containing an extensive list of such cases).

[41] *See e.g., Aubry v. Gadbois*, 50 Cal. App.3d 470, 123 Cal. Rptr. 365 (1975); *Baker v. Smith*, Ky. , 477 S.W.2d 149 (1971); *State v. Gleason*, Me. , 404 A.2d 573 (1979); *People ex rel. Wayburn v. Schupf*, 39 N.Y. 2d 682, 385 N.Y.S.2d 518, 350 N.W.2d 906 (1976); *Commonwealth ex rel. Sprowal v. Hendrick*, 438 Pa. 435, 265 A.2d 348 (1970).

[42] *See, e.g., Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976); *Bell v. Superior Court of Arizona*, 117 Ariz. 551, 574 P.2d 39 (1977).

The last indicator of current thinking, model acts, also shows that preventive detention is not fundamentally unfair. Specifically, the same model juvenile acts relied on in *McKeiver*, 403 U.S. at 549-50, permit preventive detention.[43]

[43] Uniform Juvenile Court Act, §14, 9A U.L.A. 1, 1-3. (National Conference of Commissioners on Uniform State Laws—1968); Standard Juvenile Court Act, Art. IV, §16, proposed by the National Council on Crime and Delinquency (6th Ed. 1959); Legislative Guide for Drafting Family and Juvenile Court Acts, §20(a)(1) (Dept. of HEW, Children's Bureau, Pub. No. 472-1969); *see also*, W. Sheridan, *Standards for Juvenile and Family Courts* (Dept. of HEW, Children's Bureau, Pub. No. 437-1966) at 62-63.

CONCLUSION

For the foregoing reasons, the amici states urge this Court to grant the relief sought by Appellant Schall and Intervenor-Appellant Abrams—to reverse the Second Circuit and hold that New York's juvenile preventive detention provisions are constitutional.

Respectfully submitted,

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Dated: August 12, 1983

APPENDIX A

STATUTORY GROUNDS FOR PREVENTIVE DETENTION IN AMICI STATES

States	*Grounds—A Juvenile May Be Detained if:*	*Citation*
Alabama	"release of the child would present a clear and substantial threat of a serious nature to the person or property of others . . .; release of such child would present a serious threat of substantial harm to such child."	Ala. Code §12-15-59(a) (2) and (3)
Alaska	"necessary . . . to protect the minor or the community."	Alaska Stat. §47.10.140
Arizona	there is "reasonable cause to believe . . . that he is likely to commit an offense injurious to himself or others."	R. Pro. for Juvenile Ct. 3(b) (2)
California	"it is a matter of immediate and urgent necessity for the protection of such minor or reasonably necessary for the protection of the person or property of another."	Cal. Wel. & Inst. Code §635.636

Statutory Grounds

Florida	"[t]here are reasonable grounds to believe that the child may physically harm or has threatened to harm witnesses, victims, other persons, or property."	Fla. Stat. §39.032(2)(f)7 (Supp. 1983)
Hawaii	"the child's immediate welfare or the protection of the community requires it."	Haw. Rev. Stat. §571-31 (b)(3)
Idaho	it is required "for their own or the community's protection."	Idaho Code §16-1802(j)
Illinois	"it is a matter of immediate and urgent necessity for the protection of the minor or of the person or property of another."	Ill. Rev. Stat. Ch. 37, §703-6 (Supp. 1983)
Indiana	"detention is essential to protect the child or the community."	Ind. Code §31-6-4-5 (c), (e), (g)
Kansas	"dangerous to self or others."	Kan. Stat. Ann. §38-1632(e) (Supp. 1982)
Louisiana	"there are reasonable grounds to believe that . . . there is a serious risk, based upon his past conduct, that the child will commit an offense if released."	Code of Juvenile Pro. Art. 40(1)

Michigan	the child's "offenses are so serious that release would endanger public safety."	Mich. Comp. Laws Ann. §712A.15(c)
Montana	"his detention is required to protect the person or the property of others or of the youth."	Mont. Code Ann. §41-5-305(1)(a)
Nebraska	it "is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another."	Neb. Rev. Stat. §43-205.03
New Hampshire	necessary "[t]o provide care and supervision for a minor who is in danger of harming himself . . .; or [t]o protect the personal safety or property of others from the probability of serious bodily or other harm."	N. H. Rev. Stat. Ann. §169-B:141 (d)(2)(ii) and (iii) (Supp. 1981)
Ohio	"required to protect the person and property of others or those of the child."	Ohio. R. Juvenile Pro. 7
Oregon	"[w]hen the court makes a written finding that the behavior of the child immediately endangers the physical welfare of the child or of anther."	Or. Rev. Stat. §419.577(5)
S. Carolina	"necessary for the protection of the community or the best interest of the child of another."	S. C. Code §20-7-600 (1976) (Supp. 1982)

Utah	"it is unsafe for the child or the public to leave him with his parents, guardian, or custodian."	Utah Code Ann. §78-3 (a) (30)
Vermont	it is "in his best interests and welfare or . . . public safety and protection reasonably require such detention."	Vt. Stat. Ann. tit. 33 §643
Washington	"[d]etention is required to protect the juvenile from himself or herself; or [t]he juvenile is a threat to community safety."	Wash. Rev. Code §13.40.040
Wyoming	"(i) [p]rotect the child's person; [or] (ii) [p]rotect the person or property of others."	Wyo. Stat. §14-6-206(a)
American Samoa	the child's "immediate welfare or the protection of the community that he be detained."	Am. Samoa Code Ann. §45.0203

APPENDIX B

JUVENILE ACTS RECENTLY AMENDED TO RESTRICT JUVENILE COURT JURISDICTION AND/OR TO MODIFY PURPOSES

Arkansas—Ark. Stat. Ann. §45-420

California*—Cal. Welf. & Inst. Code §707

Colorado—Colo. Rev. Stat. §19-1-104(4)

Connecticut—Conn. Gen. Stat. Ann. §§46b-126(a), 46b-127 (Supp. 1983)

District of Columbia—D.C. Code §16-2307

Florida*—Fla. Stat. §§39.001(2)(e), 39.02(2) (Supp. 1983)

Idaho—Idaho Code §16-1806A, 16-1806(1)(a) (Supp. 1983)

Illinois—Ill. Rev. Stat. Ch. 37, §702-7(6) (Supp. 1983)

Indiana*—Ind. Code §§31-6-1-1(1), 31-6-2-4

Kentucky—Ky. Rev. Stat. §§208E.070, 208F.010

Maine*—Me. Rev. Stat. Ann. tit. 15 §3002(c)

Minnesota*—Minn. Stat. Ann. §§260.011(2), 260.125

Mississippi—Miss. Code Ann. §§43-21-157, 43-23-29

Montana—Mont. Code Ann. §41-5-206(1)(a)(x)

Nebraska—Neb. Rev. Stat. §43-202

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* Indicates changes made in the express purposes of the juvenile law.

New Jersey—N.J. Stat. Ann. §§2A:4A-26, 2A:4-48 (Supp. 1983)

North Dakota—N.D. Cent. Code §27-20-34 (Supp. 1981)

Pennsylvania—42 Pa. Cons. Stat. Ann. §6355(a) (4) (iii)

Tennessee—Tenn. Code Ann. §37-234 (Supp. 1982)

Utah—Utah Code Ann. §78-3A-25 (Supp. 1981)

Vermont—Vt. Stat. Ann. tit. 33 §§635, 635a

Virginia—Va. Code Ann. §16.1-269(A) (3)

Washington*—Wash. Rev. Code §§13.40.010(2) (a), (c), (d), (h), 13.40.110

Wyoming—Wyo. Stat. §14-6-203(c)

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* Indicates changes made in the express purposes of the juvenile law.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-1442

UNITED STATES OF AMERICA

v.

DAVIS, WILLIAM, a/k/a "Country"
William Davis, *Appellant*

Appeal From the United States District Court for the Eastern District of Pennsylvania

D.C. Criminal No. 81-00300-01

Argued April 14, 1983

Before: HUNTER, WEIS, *Circuit Judges,*
and GERRY,* *District Judge*

Opinion filed June 21, 1983

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* Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

Jeffrey M. Miller (Argued)
1325 Spruce Street
Philadelphia, PA 19107
Attorney for Appellant

Thomas H. Lee, II (Argued)
Assistant U.S. Attorney
Peter F. Vaira
U.S. Attorney
Walter S. Batty, Jr.
Assistant U.S. Attorney
Chief of Appeals
3310 U.S. Courthouse
Philadelphia, PA 19106
Attorneys for Appellee

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. On October 14, 1981, appellant William Davis was charged in a one-count indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. App. §1202(a)(1)(1976). Violation of that statute carries a maximum prison term of two years. On October 22, 1981, appellant entered a plea of not guilty.

2. On November 21, 1981, the government filed a Notice of Request for Dangerous Special Offender Status under 18 U.S.C. §3575 (1976 & Supp. V 1981). In that notice the government asked the court to find that appellant was a dangerous special offender as defined by section 3575, if he was found guilty of violating 18 U.S.C. App. §1202(a)(1)(1976). Such a finding can result in

the increase of a defendant's imprisonment to up to a twenty-five year term, 18 U.S.C. §3575(b) (1976).

3. At a hearing conducted on March 22, 1982, appellant changed his plea to guilty. On June 8, 1982, the court conducted another hearing and concluded that appellant was a dangerous special offender. The district court thereafter sentenced appellant to a term of imprisonment of twelve years. This appeal raises five issues concerning the sentence imposed on appellant pursuant to section 3575. We will affirm the judgment of sentence.

I.

4. Section 3575(b) provides that if the district court finds that a person convicted of a felony is also a dangerous special offender, then it shall sentence him to imprisonment "for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for the [underlying] felony." 18 U.S.C. §3575(b) (1976). The definition of a "special" offender applicable to this appeal is an individual who, apart from the underlying felony, has committed two or more felonies on different occasions, who has been imprisoned for at least one of them, and who either committed one of the felonies or was released from imprisonment for one of the felonies within the last five years. 18 U.S.C. §3575(e)(1) (1976 & Supp. V 1981). A "dangerous" offender is an individual for whom "a period of confinement longer than that provided for such [underlying] felony is required for the protection of the public from further criminal conduct by the defendant." 18 U.S.C. §3575(f) (1976).

5. Whenever the government wishes to have a defendant over the age of twenty-one classified as a dan-

gerous special offender, it must file a notice with the court within a reasonable time before trial or the acceptance of a plea of guilty or nolo contendere. 18 U.S.C. §3575(a) (1976). That notice must state with particularity the government's reasons for believing that the dangerous special offender classification is appropriate in that case, *Id.*

6. After a finding of guilty or a plea of guilty or nolo contendere, the sentencing judge must hold a hearing without a jury to determine whether the defendant is special and dangerous as defined by the statute. 18 U.S.C. §3575(b) (1976). The statute provides that "[i]n connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing." *Id.* The judge may consider information submitted during the trial and during the sentencing hearing, and information contained in the presentence report. *Id.* The judge must then make his findings based on proof by a preponderance of the evidence presented, and he must place those findings in the record. In his findings he must include the information on which he relied, as well as the reasons for the sentence which he imposed. *Id.; see United States v. Felder,* No. 82-1420 (3d Cir. April 25, 1983).

II.

7. Appellant first argues that section 3575(b) violates the due process clause of the fourteenth amendment because it allows the sentencing judge to find that a defendant is special and dangerous based on a preponderance of the evidence presented. Appellant argues that due process requires the government to prove beyond a reasonable doubt that a particular defendant falls within the

statutory definitions. *See United States v. Duardi*, 384 F. Supp. 874, 882-85 (W.D. Mo. 1974), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975).

8. Five courts of appeals have specifically addressed that constitutional challenge, and all have rejected it. *See United States v. Schell*, 692 F.2d 672, 676-79 (10th Cir. 1982); *United States v. Inendino*, 604 F.2d 458, 463 (7th Cir.) (per curiam) (affirming 463 F. Supp. 252 (N.D. Ill. 1978)), *cert denied*, 444 U.S. 932 (1979); *United States v. Williamson*, 567 F.2d 610, 615 (4th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160, 1172-75 (5th Cir. 1977); *United States v. Ilacqua*, 562 F.2d 399, 405 (6th Cir. 1977), *cert. denied*, 435 U.S. 906, 917, 947 (1978); *United States v. Stewart*, 531 F.2d 326, 332-34 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976); *see also United States v. Neary*, 552 F.2d 1184, 1193-94 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977) (considering only the standard of proof required to prove dangerousness); *United States v. Cox*, 556 F. Supp. 812, 813-14 (W.D. Mo. 1983); *United States v. Holt*, 397 F. Supp. 1397, 1399-400 (N.D. Tex. 1975), *modified on other grounds sub nom. United States v. Bailey*, 537 F.2d 845 (5th Cir. 1976), *cert. denied*, 429 U.S. 1051 (1977).

9. While normal sentencing proceedings are not immune from all due process attacks, *see Williams v. New York*, 337 U.S. 241, 252 n.18 (1949); *Townsend v. Burke*, 334 U.S. 736 (1948), the Supreme Court has required only minimal due process protections in those proceedings. *See United States v. Grayson*, 438 U.S. 41 (1978); *Williams v. New York*, 337 U.S. 241 (1949); *see also Gardner v. Florida*, 430 U.S. 349, 358 n.9 (1977) (plurality opinion). The Supreme Court has required additional procedural protections, however, when a convicted indi-

vidual is sentenced to a longer term of imprisonment pursuant to a statute which requires additional fact-finding by the sentencing judge. *Specht v. Patterson*, 386 U.S. 605 (1967).

10. In *Specht* the Court considered the due process rights of an individual who was convicted of a sex-related offense under one Colorado statute and who was then sentenced to an enhanced term of imprisonment pursuant to the Colorado Sex Offenders Act, Colo. Rev. Stat. Ann. §§39-191-1 to -10 (1963). That statute allowed the judge to sentence a convicted individual to a term of imprisonment from one day to life without notice or a hearing, based only on a psychiatric report, if the judge found that the individual posed a threat of bodily harm to the public or was an habitual offender and mentally ill. *Id.* §39-191-2. The Supreme Court struck down the statute in *Specht* holding:

> Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

Id. at 610.

11. We recognize the similarities between the sentencing proceedings provided for by the dangerous special offender statute and the sentencing proceeding involved in *Specht*. *Accord Schell*, 692 F.2d at 676-78; *Bowdach*, 561 F.2d at 1172-75. *But cf. Stewart*, 531 F.2d at 32 & n.2 (finding that *Specht* involves a distinct new criminal charge and is thus distinguishable from section 3575 which involves sentence enhancement based on factors aggravating the underlying offense). Section

3575, however, provides all the procedural protections which the *Specht* Court held constitutionally to be required. It provides for a hearing at which the defendant is entitled to counsel, compulsory process and cross-examination of witnesses. 18 U.S.C. §3575(b) (1976). It also requires the sentencing judge to place his findings on the record in order to allow meaningful appellate review. *Id.; see Felder*, No. 82-1420, slip op. at 13.

12. *Specht* does not hold, as appellant argues, that due process requires all findings made by the sentencing judge be based on proof beyond a reasonable doubt.[1]

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[1] In making that argument appellant relies on language in *Specht* that is part of a lengthy quote from *United States ex. rel Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966). The quoted language states that "[a] defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings." *Specht*, 386 U.S. at 609. All the courts of appeals which have specifically considered the "full panoply" language in *Specht*, however, have concluded that it does not decide the standard of proof question at issue here. *Schell*, 692 F.2d at 677-78; *Bowdach*, 561 F.2d at 1172-74; *Hollis v. Smith*, 571 F.2d 685, 689-90 (2d Cir. 1978); *see* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 Harv. L. Rev. 356, 364-73 (1975). We agree. The standard of proof question was not before either the *Specht* Court or the *Gerchman* court. Indeed, at the time of the *Specht* decision, *In re Winship*, 397 U.S. 358 (1970), which made the proof-beyond-a-reasonable-doubt standard applicable to all state criminal trials, had not yet been decided. *See Bowdach*, 561 F.2d at 1173. Furthermore, we cannot conclude that *Specht* intended fully to equate this type of sentencing proceeding with a criminal trial so as to require identical procedural protections in both contexts. *See generally Bullington v. Missouri*, 451 U.S. 430, 440-41, 446 (1981) (distinguishing sentencing pursuant to section 3575 from a trial on the question of guilt or innocence).

To determine whether due process requires that standard of proof in this type of sentencing proceeding, we must balance the defendant's liberty interest, the risk of erroneous deprivation of that interest, and the government's interest in protecting the community. *See Addington v. Texas,* 441 U.S. 418 (1979); *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). Examining those interests, we cannot disagree with the Fourth, Fifth, Sixth, Seventh, and Tenth Circuits, which have specifically held that the preponderance standard passes constitutional muster.

13. Appellant also argues that the definition of dangerous in section 3575(f) is unconstitutionally vague. Again, five courts of appeals have considered and rejected that vagueness challenge. *See Schell,* 692 F.2d at 675-76; *Williamson,* 567 F.2d at 613; *Bowdach,* 561 F.2d at 1175; *Neary,* 552 F.2d at 1194; *Stewart,* 531 F.2d at 336-37; *see also Cox,* 556 F. Supp. at 813; *Holt,* 397 F. Supp. at 1399. *But see Duardi,* 384 F. Supp. at 885-86. The dangerous special offender provisions do not make being "dangerous" a criminal offense, rather they allow a sentencing judge to enhance the punishment for certain individuals convicted—not of being dangerous—but of the underlying felony. *Bowdach,* 561 F.2d at 1175; *Stewart,* 531 F.2d at 336. *But see Lanzetta v. New Jersey,* 306 U.S. 451 (1939) (involving statute making it illegal to be a gangster). Our inquiry thus must be whether sentencing judges can apply the statutory definition of dangerousness in a non-arbitrary and non-discriminatory fashion. We believe that they can.

14. Preliminarily we note that district judges routinely determine whether a defendant is dangerous for the purposes of regular sentencing and setting bail. *See, e.g.,*

18 U.S.C. §3148 (1976) (permitting release on bail after conviction or in capital cases, unless judge finds danger to community). In addition, legislative history clarifies the intended focus of the dangerousness determination for the purpose of section 3575. Congress included the requirement of dangerousness in order to correct a problem with state recidivist statutes, most of which do not require a judge to find a defendant dangerous before sentencing him. S. Rep. No. 671, 91st Cong., 1st Sess. 88 (1969). Congress recognized that such state laws "cast too wide a net" because not every recidivist is likely to engage in criminal conduct again in the future. *Id.* Congress thus intended to narrow the reach of section 3575 to cover only "those felons whose prior convictions make them likely to repeat" and thus to pose a threat to society. *Id.* In keeping with that purpose, the dangerousness inquiry should focus on the likelihood of future criminality, given the defendant's past record, the presentence report, the nature of the present offense, and the defendant's attitude. *Neary*, 552 F.2d at 1194. In *United States v. Warme*, 572 F.2d 57 (2d Cir.), *cert. denied*, 435 U.S. 1011 (1978), the Second Circuit phrased the inquiry as whether the "nature and frequency of defendant's previous encounters with the law," as well as the other information contained in the presentence report, indicate that the defendant "has no regard for the law and the rights of the public." *Id.* at 62. It noted that the statute does not require a finding that the defendant has a "propensity to cause physical harm to others" in order to satisfy the dangerousness requirement. *Id.* Given its focus on the probability that the defendant will engage in future criminal conduct, we conclude that the statutory definition of dangerousness is not unconstitutionally vague. In so con-

cluding, we join the Fourth, Fifth, Sixth, Seventh and Tenth Circuits.

15. Appellant raises another vagueness challenge to the statute. He argues that the portion of section 3575(b), which provides that the sentence imposed on a dangerous special offender must be "appropriate" and "not disproportionate in severity" to the maximum term of imprisonment for the underlying felony, is unconstitutionally vague. He contends that such language provides "no realistic standards for imposing punishment." Brief of Appellant at 22. The Sixth Circuit rejected that challenge in *United States v. Stewart,* 531 F.2d at 330-35, and we also reject it.

16. Admittedly the proportionality language in section 3575 does not give explicit directions to the judge on how to impose a sentence. As we recognized in *Felder,* No. 82-1420, slip op. at 11, Congress could have adopted a statute which specified the maximum allowable dangerous special offender sentence in terms of a fixed multiple of the maximum sentence for the underlying felony. Congress did not do so, and we do not believe that the decision to provide flexibility in sentencing under section 3575 renders the statute constitutionally infirm.

17. The purpose of the proportionality language in section 3575 is to ensure that "the sentence for an offense remain[s] at least partially focused on that offense rather than on prior conduct or other factors." *Felder,* No. 82-1420, slip op. at 8. Relying on the legislative history of section 3575, in *Felder* we suggested guidelines for sentencing judges in effectuating that purpose:

> In order to give effect to the proportionality requirement, the court imposing a sentence under the

> dangerous special offender provision must keep sight of the fact that the maximum sentence for the underlying felony is the only legitimate base for a proportional section 3575 sentence. In that way the underlying felony, which is the reason that the defendant is in court in the first place, will retain its central place in sentencing. The extent to which that sentence should be augmented will depend on a number of factors, such as the nature and seriousness of the conduct which led to the defendant's characterization as a dangerous special offender in the first place. Thus, for defendants characterized as dangerous special offenders because of recidivism . . . the number, type and time of the prior offenses will be relevant, as well as "information about the defendant, his crime, and the context in which it was committed."

Id. at 12 (quoting S. Rep. No. 671, 91st Cong., 1st Sess. 91 (1969)); *cf. Williamson*, 567 F.2d at 616 (examining nature of underlying offense, legislative purpose of section 3575, and punishment authorized by other recidivist statutes to determine proportionality).

18. Given those guidelines we believe that sentencing judges can implement the proportionality requirement in a non-arbitrary and non-discriminatory fashion. It is true that sentencing under section 3575 leaves much to the discretion of the sentencing judge, but so indeed does normal sentencing. Unlike normal sentencing, however, the dangerous special offender provisions provide a substantial check on the exercise of that discretion in the form of broad appellate review pursuant to 18 U.S.C. §3576 (1976). *See United States v. DiFrancesco*, 449 U.S. 117, 142-43 (1980); *Felder*, No. 82-1420, slip op. at 5-6. We

therefore reject appellant's contention that the proportionality requirement in section 3575(b) is too vague to assure fair sentencing.

19. In addition to attacking the constitutionality of section 3575, appellant also attacks the particular sentence imposed on him pursuant to that statute. He argues that we should vacate his twelve-year sentence because it is disproportionate in severity to the two-year maximum authorized by 18 U.S.C. App. §1202(a)(1) (1976) for the possession of firearms by a felon.

20. In *Felder* the district judge also gave the defendant a twelve-year sentence pursuant to section 3575 after a jury convicted him of violating 18 U.S.C. App. §1202(a)(1) (1976). We remanded for resentencing in that case, not because we concluded that the twelve-year sentence was disproportionately severe, but instead because there was no indication in the record that the district judge had taken the proportionality requirement into consideration when he imposed the sentence. *Felder*, No. 82-1420, slip op. at 13. We declined to adopt a rigid ratio of proportionality in *Felder*. *Id.* at 11. Similarly, here we cannot hold that a sentence that is six times the maximum authorized for the underlying felony will always be disproportionate as a matter of law. *See United States v. Williamson*, 567 F.2d at 616-17 (rejecting proportionality challenge to eight-year sentence imposed pursuant to section 3575 for violation of statute carrying a two-year maximum); *see also United States v. Moccia*, 681 F.2d 61, 66 (1st Cir. 1982) (rejecting proportionality challenge to fifteen-year sentence imposed pursuant to dangerous special drug offender provision, 21 U.S.C. §849 (1976), for violation of statute carrying an eight-year maximum).

21. In reviewing the particular sentence in this case, we note preliminarily that we are not faced with the problem that we faced in our attempt to review the sentence in *Felder*. The district judge in this case specifically recognized the statutory proportionality requirement and carefully recited his reasons for imposing the twelve-year sentence. Furthermore, his reasons are completely consistent with our guidelines in *Felder*.

22. In this case the judge carefully considered the seriousness of the firearms offense to which appellant had pled guilty. Supp. app. at 16a, 18a. He then detailed the nature of appellant's conduct leading to his classification as a dangerous special offender. *Id.* at 16a-19a. He noted that appellant had been arrested twenty-eight times and had been convicted of eleven crimes, six of which were felonies. One of his convictions was for atrocious assault and battery, and another was for murder. Both of those crimes involved firearms. Appellant had been convicted of two state weapons violations, and he had also been convicted on two previous occasions of violating 18 U.S.C. App. §1202(a)(1) (1976). Another conviction was for the distribution of heroin in violation of 21 U.S.C. §841 (a) (1976). Focusing on appellant himself, the judge noted that he had no roots in the community, was not married, had no regular residence, no regular employment and no regular income. The judge further indicated that appellant had been granted probation in many of his convictions and had not succeeded on probation. He also noted that appellant had been arrested on drug charges even while out on bail in this case. The judge then concluded that given appellant's record of violence with firearms as well as his other serious offenses, "only a sub-

stantially enhanced period of incarceration will serve the congressional purposes" of section 3575. *Id.* at 16a. Before imposing the twelve-year sentence, the judge specifically took note of the proportionality requirement and concluded that the sentence which he was imposing was not disproportionate in severity to the maximum term for the underlying felony. *Id.* Reviewing all the reasons recited by the district court and the particular facts in this case, specifically appellant's history of criminal conduct involving the use and possession of firearms, we see no reason to disturb the twelve-year sentence.[2]

23. Appellant's final argument is either that his conviction must be reversed or that his sentence must be vacated because his counsel (not his lawyer on appeal) did not inform him until the day that he changed his plea to guilty that the government was requesting the dangerous special offender classification in this case. Appellant phrases his claim as a violation of section 3575's notice requirement. The statute requires only that the government give notice under seal to the court of its intent to request the dangerous special offender classification within a reasonable time before trial or before the court accepts a plea of guilty. 18 U.S.C. §3575(a) (1976). Here the government clearly satisfied that statutory requirment. It filed its notice with the court on November 21, 1981,

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[2] To the extent that appellant may also be raising an eighth amendment claim, *see* Brief of Appellant at 25, we reject it. *See Rummell v. Estelle*, 445 U.S. 263 (1980) (mandatory life sentence under recidivist statute for individual convicted of third property-related felony does not violate eighth amendment); *Graham v. West Virginia*, 224 U.S. 616 (1912) (mandatory life sentence under recidivist statute for individual convicted three times of horse theft does not violate eighth amendment).

and served the notice on appellant's counsel shortly thereafter. Supp. app. at 37a. Appellant entered his guilty plea roughly four months later.

24. Appellant's claim, therefore, is essentially a claim of ineffective assistance of counsel. His argument is that his counsel's failure to inform him of the government's request prevented him from making a knowing and intelligent decision to change his plea to guilty. Generally, however, appellate courts are unable to consider ineffective assistance of counsel claims on direct appeal because they involve allegations and evidence outside the trial record. *United States v. Frankenberry,* 696 F.2d 239, 241-42 (3d Cir. 1982); *United States v. Sturm,* 671 F.2d 749, 750-51 (3d Cir.) (per curiam), *cert. denied,* 103 S.Ct. 95 (1982); *United States v. Rad-O-Lite of Philadelphia, Inc.,* 612 F.2d 740, 743-44 (3d Cir. 1979); *United States v. Garcia,* 544 F.2d 681, 684 n.1 (3d Cir. 1976). In this case, for example, there is no way that we can determine from the record whether appellant's lawyer ever discussed the consequences of sentencing under section 3575 with him before the day of the hearing where appellant changed his plea. The record does show, however, that the judge carefully explained those consequences to appellant at the time of his change-of-plea hearing. Supp. app. at 4a-6a, 9a.

25. Without expressing any opinion on the merits of appellant's claim, we decline to review it on direct appeal. Our disposition is without prejudice to appellant's ability to pursue his claim in a collateral proceeding pursuant to 28 U.S.C. §2255 (1976). At that time the district court will be able to develop an appropriate factual record.

III.

26. For the reasons expressed in this opinion, we will affirm the judgment of sentence.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit